No. 08-367

Supreme Court, U.S.
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# In The Supreme Court of the United States

ISLANDER EAST PIPELINE COMPANY, L.L.C.,

*Petitioner,*

v.

GINA MCCARTHY, COMMISSIONER OF THE STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION, and STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the agency's administrative decision is supported by the record?

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## STATEMENT OF THE CASE

This case involves a routine record appeal of a state administrative agency determination under Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341. The question of whether a determination by the Federal Energy Regulatory Commission (FERC) to issue a certificate of public convenience and necessity to a natural gas pipeline company divests a state of jurisdiction to review the water quality impacts of the project under the Clean Water Act was not presented to or considered by the court below.

The Court of Appeals for the Second Circuit properly stated the law and applied it correctly to the facts presented. There is no reason, compelling or otherwise, to grant this petition.

## BACKGROUND

The facts are accurately summarized in the decision of the Court of Appeals below.

In June, 2001, Islander East applied to FERC for a certificate of public convenience and necessity for a natural gas pipeline from Connecticut to Long Island, New York. On September 19, 2002, after completion of an environmental impact statement in accordance with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, in which FERC staff concluded that another route was an environmentally preferable alternative, FERC issued the certificate for the less-desirable alignment. After

rehearing, FERC affirmed its decision on January 17, 2003.

On February 13, 2002, as required by Section 401 of the CWA, Islander East sought a permit from the Connecticut Department of Environmental Protection (CTDEP) certifying that any discharges from the project and its construction were consistent with the state's water quality standards (WQS). The state denied this application on February 5, 2004.

Islander East petitioned for review, and, on October 5, 2006, the Court of Appeals remanded the matter to CTDEP for further consideration. *Islander East Pipeline Co., LLC v. State of Connecticut Department of Environmental Protection*, 482 F.3d 79 (2d Cir. 2006) (*Islander East I*). On December 19, 2006, CTDEP issued a second, 81 page denial.

Islander East again petitioned for review. On May 2, 2008, the Court of Appeals denied this petition, concluding that "the CTDEP supports its second denial with reasoned explanations tied to record evidence." *Islander East Pipeline Co., LLC v. Gina McCarthy, Commissioner of Connecticut Department of Environmental Protection and State of Connecticut Department of Environmental Protection*, 525 F.3d 141, 142 (2d Cir. 2008) (*Islander East II*).

## REASONS FOR DENYING THE WRIT

Petitioner is seeking this Court's review of the decision of the Court of Appeals on a routine record

appeal of a state administrative agency decision. Petitioner's claim to this Court that FERC approval under the National Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.*, restricts or limits state review under the Clean Water Act was never presented or considered below. Further, this Court has made clear that a FERC certificate does not deprive a state of authority to act under the CWA.

## THE PETITION PRESENTS ONLY A ROUTINE RECORD APPEAL OF A STATE ADMINISTRATIVE AGENCY DECISION

In the Court of Appeals, both parties agreed, and the court correctly held, that the applicable standard of review of the agency's decision was that of the Administrative Procedure Act—"whether the CTDEP's determination that the project would violate Connecticut's water quality standards is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A)." *Islander East II*, 525 F.3d at 150; *Islander East I*, 482 F.3d at 94.

After a thorough and detailed review of the administrative record, the court concluded as follows:

> Record evidence supports the CTDEP's finding that various techniques to be employed by Islander East in installing the proposed pipeline would violate state water quality standards by eliminating a significant area of nearshore waters from their existing and designated use of shellfishing. On such a record, we cannot

> conclude that the CTDEP's decision to deny Islander East a certificate of compliance was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)."

*Islander East II*, 525 F.3d at 164; *see also id.* at 153 ("[W]aters in the pipeline corridor are an existing and designated habitat for shellfish and that shellfishing is an existing and designated use of these waters.")

In its extensive review and discussion of the detailed factual administrative record and lengthy CTDEP ruling, the court concluded that each of the following separate and distinct factual findings of the CTDEP—each challenged by Islander East—was supported by the record and supported CTDEP's determination to deny the certification. Installation of the pipeline would result in the loss of commercial shellfish harvesting in the waters in the nearshore pipeline corridor because:

> a) Damage from "anchor strikes" and "cable sweeps" "between mileposts 12 and 20 was sufficient to support the CTDEP's finding of a significant loss of existing and designated shellfishing use. *Id.* at 155;
>
> b) "[A]n anchor corridor scarred by anchor strikes and cable sweeps would be lost in its entirety to shellfishing." *Id.*;
>
> c) "[T]he technological and methodological advances that distinguish the Islander East pipeline proposal from [an earlier pipeline]would not sufficiently reduce

the risk of damage caused by anchor strikes and cable sweep to avoid the loss of the existing and designated shellfishing use of a significant area." *Id.* at 157;

d) The proposed use of "engineered backfill" by Islander East to refill a dredged area would not protect certain shellfish species that had lived in that area. *Id.* at 158-160.

The Court of Appeals' review of the entire factual record and its determination that the record provided reasonable support for the CTDEP's determination to deny the requested certification constitutes almost the entirety of the Second Circuit's decision. A court's detailed factual review of an agency's administrative determination and the factual basis of that determination is not an appropriate matter for a grant of certiorari.

**PETITIONER'S CLAIM, RAISED FOR THE FIRST TIME ON APPEAL, THAT BECAUSE FERC HAS "EXCLUSIVE JURISDICTION" OVER INTERSTATE GAS PIPELINES, STATE AGENCIES CANNOT DENY A PERMIT FOR A PIPELINE FERC HAS APPROVED, IS NOT PROPERLY BEFORE THIS COURT AND IS BASELESS**

In neither appeal did Petitioner raise and argue the issue it asks this Court to review: the claim that because FERC has "exclusive jurisdiction" over interstate gas pipelines, a state agency cannot deny a

permit for a pipeline that FERC has approved. The only issues raised by the Petitioner to the Court of Appeals were: "[w]hether the 2006 Denial is inconsistent with Federal law because the project is consistent with Connecticut's federally approved water quality standards ("WQS") and the CTDEP's application of its WQS in the 2006 Denial was arbitrary and capricious," and "[w]hether CTDEP's 2006 Denial is inconsistent with federal law because it is the product of bias and predetermination." Brief of Petitioner to the United States Court of Appeals for the Second Circuit, *Islander East Pipeline Company, L.L.C. v. Gina McCarthy*, pp. 2-3 [*Islander East II*].

After two appeals, the Petitioner now claims for the first time that FERC has "exclusive jurisdiction" over interstate gas pipelines such that the state agencies cannot properly deny a permit under the CWA for a pipeline FERC has approved. This assertion is baseless.

Section 401 of the CWA plainly requires projects, such as Islander East's, to meet *both* the terms of relevant siting laws like the NGA and the more stringent environmental terms of the CWA. Congress has delegated the process of certifying compliance with water quality standards to the states entirely. Section 401 explicitly states that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge in to the navigable waters, shall provide . . . a certification from the State in which" the activity occurs. 33 U.S.C. § 1341(a). The entire premise of Section 401 is that primary

responsibility for water quality certification lies with the states. The CWA states unequivocally that "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b).

In the CWA, Congress explicitly directed that, "No license or permit shall be granted if certification has been denied by the State. . . ." 33 U.S.C. § 1341(a). The authority outlined in Section 401 is completely consonant with Congress' clear affirmation of traditional state control over state waters as set forth in Section 510 of the Clean Water Act. "[N]othing in this chapter shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370. "The ability of states to enforce their own more stringent water quality standards by denying certification for a nationwide permit is consistent with the legislative purpose and history of the Clean Water Act . . . The legislative history of section 401 of the Act ("Certification") confirms that Congress intended to give the states veto power over the grant of federal permit authority for activities potentially affecting a state's water quality." *United States v. Marathon Dev.*

*Corp.*, 867 F.2d 96, 99 (1st Cir. 1989). Congress has never overridden these provisions of the CWA.

Section 303 of the CWA directs the states to adopt water quality standards that "shall consist of the designated uses of the navigable waters involved and the water quality criteria for those waters based upon such uses." *See* 33 U.S.C. § 1313(c)(2)(A). Such standards shall take into consideration the "use and value of navigable waters for public water supplies, propagation of fish and wildlife, recreational purposes, and . . . their use and value for navigation." *Id.* As the Court of Appeals pointed out, "[t]he Clean Water Act specifically protects "existing" and "designated" uses of navigable waters," citing *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dep't of Ecology,* 511 U.S. 700, 704-05, 114 S.Ct. 1900 (1994). *Islander East II*, 545 F.3d at 144.

As the Court of Appeals noted, the FERC's NGA jurisdiction over natural gas company projects is subject to compliance not only with NEPA, but also with the CWA and the Coastal Zone Management Act (CZMA), 42 U.S.C. § 1451 *et seq.*, which are state-administered under federal law. The Court of Appeals in *Islander East I* even quoted the FERC's own acknowledgement of this exception to the broad preemptive sweep of the NGA in the latter's Islander East certification decision: "[w]hile state and local permits are preempted under the NGA, state authorizations required under federal law are not." *Islander East I*, 482 F.3d at 84; Pet. App. at 317a; *see also Islander East II*, 525 F.3d at 143 (citing same).

Further, this Court has already addressed this issue in a case involving the interplay between the CWA and the NGA, noting that "[Section] 401 of the Act requires States to provide a water quality certification *before* a federal license or permit can be issued. . . ." *PUD No. 1*, 511 U.S. at 707 (Emphasis added). It is clear, therefore, that FERC cannot simply override the requirements of the CWA by issuing a certificate. FERC itself conceded the legal point that Islander East "is required to fulfill all Federal permitting and certification requirements before it can commence construction, including CZMA and CWA requirements. . . . This is consistent with the court's ruling in *PUD*." Pet. App. at 320a.

Petitioner cites no conflicting opinions or decisions on this question of whether a FERC approval of a pipeline under the NGA preempts state review under the Clean Water Act. As this claim was not raised below, does not implicate a question on which the lower courts are in disagreement, and, in fact, has already been decided by this court, it does not present an issue upon which review should be granted.

## CONCLUSION

For all of the reasons set forth herein, Islander East's petition for a writ of certiorari should be denied.

Respectfully submitted,

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